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SUBJECT: PRESIDENT, PM SIGN PACT TO FORM POST-ELECTION  
VIOLENCE TRIBUNAL

REF: A. NAIROBI 2551  
[1](#)B. NAIROBI 2401  
[1](#)C. NAIROBI 1838  
[1](#)D. NAIROBI 1170  
[1](#)E. NAIROBI 2762

SUMMARY  
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[1](#)1. President Mwai Kibaki and Prime Minister Raila Odinga signed on December 17 an agreement to implement the recommendations of the Commission of Inquiry into Post-Election Violence (CIPEV), also known as the Waki Commission (Reftels). The agreement tasks a Cabinet sub-committee to draft legislation to establish a Special Tribunal expected to try at least ten high-level politicians and businessmen whom the Waki Commission suspect organized and/or financed post-election violence. The agreement further holds that any public official charged by the Special Tribunal will be suspended until the case is resolved and that those convicted will be barred from elective or other public office. Kibaki and Odinga also agreed to undertake sweeping police reforms, including the establishment of a independent civilian oversight authority for police. Signing the agreement meets the first of several benchmarks set by the Waki Commission. Parliament must now enact legislation establishing the Special Tribunal by January 31 or risk that the International Criminal Court will assert jurisdiction. Kofi Annan, who mediated the agreement that ended Kenya's post-election crisis and which established the Waki Commission, issued a statement welcoming the agreement (See text para. 5). The statement also stressed that the Government should meet the original implementation deadlines in the Waki report. The Ambassador had urged the need for rapid action in his December 9 reform agenda speech (Ref D) and has also welcomed the action taken. The legislation is largely ready and we expect President Kibaki will recall Parliament early from its recess to beat the deadline. END SUMMARY

The Waki Commission  
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[1](#)2. The Waki Commission was appointed as part of the Kofi Annan-led mediation process which resolved Kenya's post-election crisis. Its mandate was to investigate the causes and nature of the post-election violence, to recommend prosecutions where justified by the evidence, and to suggest reforms to help prevent future instances of election violence (Ref D). It began work in June. After three months of testimony from state security personnel, politicians, individuals, and non-governmental organizations, the Waki Commission concluded that some post-election violence was planned, while other acts were a spontaneous reaction to the belief on the part of Odinga supporters that the presidential

election had been stolen. The Waki Commission found sufficient evidence to develop a list of ten suspected high-level organizers and financiers of post-election violence, but did not release the names of these suspects (Ref B). It proposed a Special Tribunal be formed to investigate and try these suspects. The report also concluded that planning for, and reaction to, post-election violence by Kenya's police services was inadequate. It condemned police forces for the frequent use of excessive force to quell post-election violence. The Waki Commission recommended significant reform to the Kenya Police Service and Administration Police (Ref B).

¶3. The Waki Commission, in conjunction with the International Criminal Court (ICC), created a strategy to ensure that its recommendations would be implemented. This strategy called for the Kenyan Government and Parliament to meet tight deadlines for establishing the Special Tribunal. The key deadlines were that President Kibaki and Prime Minister Odinga had to sign an agreement to implement the Waki Commission's recommendations within 60 days of receiving the report. Subsequently, legislation establishing the Special Tribunal must be enacted within 45 days, with a further 30 days given to make the Special Tribunal operational. Failure to meet any of these deadlines would result Annan recommending that the ICC initiate investigations of those suspected by the Waki Commission. Deadlines related to police reform were much less specific and do not have a self-implementing mechanism.

The Agreement

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¶4. On December 17 President Kibaki and Prime Minister Odinga signed an agreement in principle to implement the report's recommendations, just beating the 60-day deadline. The agreement assented to the formation of the Special Tribunal and tasked a Cabinet subcommittee with drafting legislation to establish the tribunal. It further holds that any public official charged by the tribunal will be suspended until the case is resolved and that those convicted by the Special Tribunal will be barred from holding elective or appointed public office. Kibaki and Odinga also agreed to undertake major police reforms, including the establishment of a independent civilian oversight authority for police.

Kofi Annan Welcomes  
The Agreement

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¶5. On December 19, Kofi Annan issued the following statement welcoming the agreement. To follow is a text of his statement.

Begin text:

I am pleased that President Mwai Kibaki and Prime Minister Raila Odinga have signed an agreement for the implementation of the recommendations of the Commission of Inquiry into Post-Election Violence (CIPEV). The implementation of CIPEV's proposals will go a long way towards ending the culture of impunity and spearheading much-needed institutional reforms in the country. I note that the Parties to the agreement will now prepare and submit to the National Assembly a draft bill for the establishment of the Special Tribunal for Kenya. I trust that the bill will reflect the spirit of CIPEV's proposals and incorporate all its key provisions. I urge Kenya's leaders to redouble their efforts to implement the CIPEV recommendations and to respect the suggested timeline for action.

Equally important is continued progress on electoral reform. In this regard, I am pleased that the National Assembly has passed the Constitution of Kenya Amendment Bill, 2008,

setting the stage for the implementation of the crucial reforms recommended by the Independent Review Commission on the 2007 elections. Moving forward on the reform agenda is imperative for building a more stable and democratic Kenya.

End text.

Next Steps

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¶6. The next deadline is that Parliament must pass legislation establishing the Special Tribunal on or before January 31, 2009. Parliament adjourned for holiday recess on December 18. It would normally resume in March 2009. However, President Kibaki is likely to recall Parliament in late January to debate and pass legislation before the deadline expires.

¶7. Both Kibaki and Odinga have exerted strong leadership on their followers to implement the Waki Report. Their leadership, and the possibility that the ICC might assume jurisdiction, has forged a consensus to implement the Waki Report. The Cabinet subcommittee mentioned in the agreement was formed in November and, chaired by Deputy Prime Minister Musalia Mudavadi, has completed its implementation plan. The consensus reached accepts international participation in the trial and appeals court, but Kenyans would act as chief judges in both. Regarding the selection process, the government position is that President Kibaki would make appointments of Kenyans judges in consultation with the Prime Minister and the Chief Justice of Kenya. International appointments and the appointment of the Kenyan deputy prosecutor would be made by President Kibaki on the recommendation of the African Union Panel of Eminent Persons, an ad hoc body headed by Kofi Annan.

¶8. Kibaki and Odinga had hoped that Cabinet would adopt the plan and that Parliament would pass the legislation before it adjourned last week. However, these plans were delayed by parliamentary wrangling over a constitutional amendment to disband the Electoral Commission of Kenya, which prevented Cabinet from considering the plan.

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POLICE REFORM

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¶9. The agreement also agrees in principle to implement the Waki Report's implementation on police reform. This includes a top-to-bottom review of tactics, weapons, and use-of-force doctrine of Kenya's police forces, as well as establishment of an independent oversight authority which would be empowered to take public complaints about police behavior and to discipline police officers. This is a massive task and its implementation is not tied to a fixed timeline.

COMMENT

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¶10. The signing of the agreement represents another positive step in implementation of the reform agenda. It appears that much of the groundwork to establish the Special Tribunal has been laid. Annan has blessed the agreement and his call for the parties to respect the timeline for implementation of the Waki Report's recommendations sends a clear signal that Kenya will not, as many local politicians hoped, be allowed to delay implementation. We expect Kibaki to reconvene Parliament in mid-January to debate the legislation. The Ambassador, in his private meetings and public comments over the past months (Ref E), has strongly urged the Grand Coalition government to take action as well as expressed confidence they would fully implement the Waki Commission recommendations. We will continue to stress the importance of establishing the Special Tribunal and of reforming Kenya's

police forces at the highest level of government. End  
Comment.

RANNEBERGER